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7 KIRSTIN JOHNSON, et al.,
8 Plaintiffs,
9 v.
10 KIERSTIE BARR, et al.,
11 Defendants.

Case No. [20-cv-01569-SK](#) (JD)

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19 **ORDER RE MOTION TO
DISQUALIFY**

20 Re: Dkt. No. 26

21 Plaintiff Kirstin Johnson, on behalf of herself and as guardian ad litem for her minor
22 children, has sued the City and County of San Francisco and others for civil rights claims arising
23 out of an incident involving San Francisco Police Department officers in January 2019.¹ Dkt. No.
24 1-1. Johnson's husband is also a plaintiff. *Id.* ¶ 12. The case was removed from the California
25 Superior Court on the basis of federal question jurisdiction. Dkt. No. 1. It was randomly assigned
26 to Magistrate Judge Sallie Kim, and all parties consented to magistrate judge jurisdiction under
27 U.S.C. § 636(c). Dkt. Nos. 6, 7.

28 As the case ramped up, Judge Kim was asked to decide a protective order dispute. Dkt.
1 No. 25. Defendants produced videos of the incident that featured the minor children, and
2 proposed to designate the videos as "confidential" in accordance with their understanding of
3 California laws protecting juveniles. *Id.* at 1. Plaintiffs objected to the designation, and
4 apparently wanted the videos to be freely available to the public. *Id.*

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27 ¹ The complaint refers to Johnson as guardian ad litem, as do the parties and the magistrate judge.
28 An order appointing Johnson as guardian does not seem to have been filed on the docket, *see*
Federal Rules of Civil Procedure Rule 17(c)(2), but the Court will do the same for present
purposes.

1 In a written order, Judge Kim granted a confidentiality designation for all portions of the
2 videos that showed the children to protect them from “embarrassment or harm if these images are
3 shown in the public.” *Id.* She acknowledged that she had not had an opportunity to view “the
4 entirety of the video footage,” and expressly contemplated potential revisions to the designations
5 pending further discussions between the parties, and other proceedings. *Id.* at 2. Judge Kim also
6 said that “the failure of the minor Plaintiffs’ parents to protect them from this harm is disturbing,”
7 and that the duty of a guardian ad litem was “to protect the interests of the minors” including
8 “consideration of future harm” from public display of the videos. *Id.* at 1.

9 These latter comments triggered a heated response. In plaintiffs’ view, they manifested an
10 actual bias, or an appearance of bias, against them that warrants removal of Judge Kim from the
11 case under the judicial disqualification and recusal statutes, 28 U.S.C. §§ 144 and 455. *See* Dkt.
12 No. 26. Plaintiffs say they felt “insulted,” and that Judge Kim had in effect called Johnson “a bad
13 mother.” *Id.* at 9. They are particularly aggrieved that Judge Kim made the comments without
14 reviewing all of the videos, which they believe indicates a “high degree of favoritism” toward
15 defendants, and “antagonism” towards them. *Id.* at 9-10.

16 Judge Kim referred the motion for assignment to another judge for disposition, and
17 deferred any further rulings in this case. Dkt. No. 27. Under established procedures, a referral
18 was not necessary, and Judge Kim could have decided the disqualification motion herself. *See*
19 *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 257 F. Supp. 3d 1084, 1088 (N.D. Cal. 2017).
20 Even so, she made the referral, undoubtedly out of an abundance of caution and to maximize the
21 parties’ and the public’s confidence in the judicial process.

22 The motion was assigned to this Court as the district judge on duty for general matters at
23 the time of the referral. The Court deems it suitable for resolution without a hearing. Civil Local
24 Rule 7-1(b). Disqualification is denied.

25 In *National Abortion Federation*, the Court reviewed in detail the law governing
26 disqualification under Sections 144 and 455. *See* 257 F. Supp. 3d at 1088-89. Those standards
27 apply fully here. Under Section 144, the party seeking disqualification must show through a
28 “timely and sufficient affidavit that the judge before whom the matter is pending has a personal

1 bias or prejudice either against him [or her] or in favor of any adverse party.” Under Section 455,
2 a judge must “disqualify [herself] in any proceeding in which [her] impartiality might reasonably
3 be questioned,” or where “[she] has a personal bias or prejudice concerning a party, or personal
4 knowledge of disputed evidentiary facts concerning the proceeding.”

5 For both statutes, the test is an objective one and asks “whether a reasonable person with
6 knowledge of all the facts would conclude that the judge’s impartiality might reasonably be
7 questioned.” *Nat’l Abortion Fed’n*, 257 F. Supp. 3d at 1089 (quoting *United States v. Holland*,
8 519 F.3d 909, 913-14 (9th Cir. 2008)). A “reasonable person for this inquiry is not someone who
9 is hypersensitive or unduly suspicious, but rather is a well-informed, thoughtful observer.” *Id.*
10 (internal quotations omitted).

11 Disqualification must be evaluated in light of the principle that a judge has “as strong a
12 duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts
13 require.” *Id.* (quoting *Clemens v. U.S. Dist. Court for Central Dist. of Cal.*, 428 F.3d 1175, 1179
14 (9th Cir. 2005)). Our circuit also holds that “section 455(a) claims are fact driven, and as a result,
15 the analysis of a particular section 455(a) claim must be guided, not by comparison to similar
16 situations addressed by prior jurisprudence, but rather by an independent examination of the
17 unique facts and circumstances of the particular claim at issue.” *Id.* (internal quotation omitted).

18 It is regrettable that plaintiffs found insult in Judge Kim’s comments. Litigation is hard
19 enough without also feeling slighted or personally criticized along the way. But no reasonable
20 person would find actual bias, or an appearance of bias, in the magistrate judge’s remarks. At
21 heart, the comments simply expressed concern about safeguarding the interests of the minor
22 plaintiffs. The magistrate judge has a “special duty” to ensure that protection. *Robidoux v.*
23 *Rosengren*, 638 F.3d 1177, 1181 (9th Cir. 2011). The guardian ad litem is also charged with the
24 obligation to “protect the minor” in court proceedings. Fed. R. Civ. P. 17(c)(2). It is clear from
25 the words and the context of the order that Judge Kim’s comments were directed to this
26 consideration, and so they do not evidence actual bias, or support a reasonable apprehension of
27 prejudice or favoritism.

1 Nothing in *Liteky v. United States*, 510 U.S. 540 (1994), the main case plaintiffs rely upon,
2 points to a different conclusion. It involved factual circumstances that are wholly distinct from the
3 situation here, which significantly limits its utility. To the extent *Liteky* might apply, it cuts
4 against plaintiffs. *Liteky* concluded that “expressions of impatience, dissatisfaction, annoyance,
5 and even anger” that the occasionally “imperfect men and women” of the federal judiciary
6 “sometimes display” do not evidence bias or partiality. *Liteky*, 510 U.S. at 555-56. Even if
7 plaintiffs’ characterization of Judge Kim’s comments as personally derogatory or insulting were
8 taken at full value, which the Court has not determined is warranted, they fall within the
9 parameters set by *Liteky*.

10 The fact that Judge Kim did not view the entirety of the videos is of no moment. Judge
11 Kim expressly left open the possibility of revising the confidentiality designations in plaintiffs'
12 favor pending subsequent proceedings. The order clearly contemplated a two-step process of
13 containing any immediate risk of harm to the children, followed by a fine-tuning of the
14 designations by the parties and the court. No door was closed to plaintiffs to their detriment.

15 Plaintiffs have not established a basis for disqualification of Judge Kim in the record
16 before the Court. They did not argue for disqualification on any other grounds, such as
17 extrajudicial evidence of a deep-seated or pre-existing bias. *See Liteky*, 510 U.S. at 556.
18 Consequently, the motion is denied.

IT IS SO ORDERED.

20 Dated: December 9, 2020

JAMES DONATO
United States District Judge